

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Rules and Regulations Implementing the)
Telephone Consumer Protection Act of 1991)

CG Docket No. 02-278

To: The Commission)
)
)
)**PETITION FOR RECONSIDERATION**

The American Society of Association Executives ("ASAE")¹ hereby petitions for reconsideration of that portion of the Commission's Report and Order (as defined below) which governs unsolicited facsimile advertisements as it relates to tax exempt nonprofit organizations.² The rules at issue in this Petition are set forth in the Report and Order of the Federal Communications Commission ("Commission") in the Matter of the Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 ("TCPA"), adopted June 26, 2003 and published in the Federal Register on July 25, 2003 ("Report and Order"). Initially the Report and Order, and the rule modifications promulgated there under were to have become effective on August 25, 2003. The Commission adopted an Order on Reconsideration that delays the effective date of certain changes in its unsolicited facsimile rules until January 1, 2005. The Commission's Order on Reconsideration also expressly provides that the extension will provide the Commission with the opportunity to review petitions for reconsideration on the unsolicited facsimile advertisement issue. Therefore, ASAE respectfully petitions the Commission to reconsider the applicability of the unsolicited facsimile advertisement rules to tax exempt nonprofit organizations, and as a consequence, to expressly hold that unsolicited facsimile communications of any type do not require the prior consent, express or otherwise, of the recipient where the communication is (i) from a tax exempt nonprofit organization and (ii) relates to one or more of the organizations duly authorized tax exempt nonprofit purposes. ASAE hereby incorporates by reference its Petition for Emergency Clarification filed with the Commission on July 25, 2003.

¹ The American Society of Association Executives represents over 25,000 professionals that manage tax exempt nonprofit organizations and is considered the "association of associations."

² Tax exempt nonprofit organizations comprise a discrete and unique class of entities in the United States. Nonprofit corporation status is granted by states under their nonprofit corporation laws to organizations that generally do not issue equity stock and do not seek commercial profit on behalf of shareholders. Federal income tax exempt status is granted by the Internal Revenue Service to organizations that are organized on a nonprofit basis, do not share revenues with individuals, and meet extensive IRS requirements in numerous categories.

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BACKGROUND

The American Society of Association Executives

ASAE's membership consists of professionals who manage or work for virtually every kind of tax exempt nonprofit organization. These tax exempt nonprofit organizations exist to serve and provide value to their members and constituencies, who, almost invariably, seek out membership and/or involvement in the organization. Organization membership and participation provide an important resource to individuals to achieve a variety of personal, professional, business, social, and educational goals. To assist individuals and others achieve their goals, tax exempt nonprofit organizations continuously strive to offer a variety of current communications, sophisticated educational courses and seminars, and related publications, such as books and periodicals. The purpose of such communications is to provide information and resources consistent with their tax exempt nonprofit purposes, rather than to carry on a trade or business which is the chief objective of any for-profit entity. To provide these resources and information for their tax exempt nonprofit purposes, these organizations must be able to freely communicate with their members and other constituencies. Often these resources are provided for a reasonable fee that covers the organization's costs of development, marketing, and distribution. As nonprofit organizations, however, all monies earned from these activities must be used to further the organization's tax exempt nonprofit work.

Prior Commission Action

Over ten years ago, the Commission promulgated rules under the Telephone Consumer Protection Act of 1991 ("TCPA") to protect consumers from unsolicited telemarketing calls as well as from unsolicited facsimile advertisements.³ The TCPA prohibits certain communications, including the use of any telephone facsimile machine, computer, or other device, to send unsolicited advertisements to telephone facsimile machines.⁴ In an Order issued in 1992 ("1992 Order"), the Commission adopted rules implementing the TCPA, including a rule prohibiting the transmission of unsolicited advertisements by facsimile machines.⁵ An unsolicited advertisement is defined as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission."⁶

³ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-728, Report and Order, FCC 03-153, para. 2 (2003) ("2003 TCPA Order").

⁴ Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 104 Stat. 2394 (1991), Section 2(5), reprinted in 7 FCC Rcd 2736 at 2744.

⁵ 47 C.F.R. § 64.1200(a)(3).

⁶ 47 C.F.R. § 64.1200(f)(5).

The Commission noted in its 1992 Order that there would be an exception made to this rule where an established business relationship existed prior to the unsolicited facsimile transmission.⁷ In a Memorandum Opinion and Order released by the Commission on August 7, 1995, the Commission exempted communications made on behalf of tax exempt nonprofit organizations from the TCPA rules. But on June 26, 2003, the Commission declared that an established business relationship is no longer sufficient to show express permission and that *all* unsolicited facsimile transmissions to any person must be preceded by the intended recipient's prior written express invitation or permission to receive unsolicited facsimiles.⁸

Tax Exempt Nonprofit Organizations and Facsimile Communications

With respect to facsimile transmissions, the Commission has not substantively addressed the special circumstances of tax exempt nonprofit organizations, other than to declare that listing of members' facsimile numbers in the directory of a trade association does not constitute the requisite approval. The Commission's application of the unsolicited facsimile rules to *all* entities, including tax exempt nonprofit organizations, will profoundly confuse, damage, and obstruct the good work of tax exempt nonprofit organizations of every kind. All tax exempt nonprofit organizations have established, legitimate constituencies with whom the organizations routinely communicate. These constituents might be dues-paying members, present or former donors, or others who have voluntarily associated themselves with the special tax exempt nonprofit missions of these organizations.

Using facsimile transmissions to communicate with members, donors, and other constituents is part of the fabric of the tax exempt nonprofit community. Facsimile machines may represent a relatively old technology, but they remain a reliable, simple, secure, and inexpensive means of communication to those who, by their membership or other participation in an organization, have clearly, but perhaps not always explicitly, invited receipt of organizational communications. Unless the Commission reconsiders its proposed application to tax exempt nonprofit organizations of the prohibition on unsolicited facsimile advertisements, the enormously laudatory and valuable work of tax exempt nonprofit organization - trade associations, professional societies, chambers of commerce, agricultural organizations; advocacy organizations, social welfare groups, charitable, educational, and scientific organizations, religious groups, and amateur sports organizations⁹ - will be unnecessarily and unjustly undermined and impeded.

Members of the tax exempt nonprofit community are deeply concerned and confused about the Commission's potential blanket application to them of the limitation

⁷ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752 (1992), 7 FCC Rcd at 8779, para. 54, n.87.

⁸ 2003 TCPA Order, para. 189.

⁹ ASAE estimates that the number of all of these organizations is well over half a million.

on unsolicited facsimile advertisements. Organizations simply do not know when the rules apply. They are aware that the FCC's new rules do not prohibit all unsolicited facsimiles, but there has been little clear guidance on how exactly to determine which facsimile communications are covered by the new rules.

Burdens on Tax Exempt Nonprofit Organizations

The uncertainty is profound and the unanswered questions are myriad. For example, is express written consent required before an organization can send an unsolicited facsimile to its members announcing a continuing educational program required for the members to maintain their professional licensing? After an individual's telephone request, is express written consent still required before an organization can send the individual information on membership dues and services via facsimile? Is prior written consent required before an organization can send a hotel invoice via facsimile to a Board member in connection with an annual Board meeting?

The burdens on tax exempt nonprofit organizations to obtain such written consents are extreme. Even in the best case scenario where an organization is certain under the new rules that written consent is required, a series of cumbersome steps is required. First, after determining the appropriate method to obtain the proposed recipient's written consent, the organization must transmit the communication. Second, the intended recipient must receive it, review it, sign it, obtain all appropriate facsimile numbers, and return the completed consent form to the organization. Third, the organization must receive the consent form, review it to ensure it is complete, then record and maintain the consent in an easily verifiable and accessible manner (after, of course, having developed an adequate dedicated facsimile consent record-keeping system). Fourth, prior to actually sending the requested information, the organization must verify the facsimile number, given the risk of liability for inadvertently sending the communication to the wrong facsimile number.

Particularly given the risk of litigation, which represents a disproportionate burden on nonprofit organizations, the Commission must exercise its authority to clarify and limit the application of the unsolicited facsimile advertising rules by expressly holding that unsolicited facsimile communications of any type do not require the prior consent, express or otherwise, of the recipient where the communication is (i) from a tax exempt nonprofit organization, and (ii) relates to one or more of the organizations duly authorized tax exempt nonprofit purposes.

DISCUSSION

ASAE contends that the Commission's rules prohibiting unsolicited facsimile advertisements set forth in Section XIII of the Report and Order are arbitrary and capricious under the Administrative Procedures Act, misinterpret the definition of "unsolicited advertisement" and the scope of its application under the TCPA, and raise

grave constitutional questions under the fundamental right of association.

Arbitrary and Capricious

The Commission's new facsimile requirements arbitrarily fail to distinguish between the activities of tax exempt nonprofit organizations and the work of for-profit, commercial entities. The language of the statute narrowly focuses its facsimile restrictions on commercial activity, but the Commission's facsimile rules implementing the TCPA are overly broad, encompassing legitimately non-profit activity. The language of TCPA is clearly directed only at regulating activity undertaken to further strictly commercial endeavors by for profit businesses. The facsimile communications that are expressly prohibited are advertisements, *i.e.*, descriptions of the commercial availability of property, goods or services. Interpreting the TCPA's facsimile advertising restrictions to include any activities of organizations operating consistent with their tax exempt nonprofit purposes is an arbitrary and capricious exercise of the Commission's regulatory authority.

Statutory Construction

There simply is no statutory basis for such a broad application of the TCPA's limitations on unsolicited facsimile advertisements to any tax exempt nonprofit organization facsimile transmission that involves the marketing, promotion, and/or sale of its goods and services. The Commission misinterprets the statutory definition of "unsolicited advertisement." The TCPA defines the term "unsolicited advertisement" as "any material advertising the *commercial availability or quality* of any property, goods, or services which is transmitted to any *person* without that person's prior express invitation or permission" (emphasis added). On the basis of this definition, the TCPA provides that:

"It shall be unlawful for any person within the United States--

...

(C) to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine;".

The Commission, however, erroneously bases its rulemaking for implementing the limitation on unsolicited facsimile advertisements on a fundamental misreading of the statutory definition of "unsolicited advertisement." The statute does not impose limitations on all unsolicited facsimile advertisements, just on those transmissions advertising the *commercial availability or quality* of property, goods, or services. (emphasis added.)

Indeed, the idea that the unsolicited facsimile transmission of any advertisement for the promotion, marketing, or sale of property, goods, or services of any kind is prohibited by the "unsolicited advertisement" definition begs the question: If Congress intended to legislate a total prohibition against sending unsolicited facsimile

advertisements, why then did Congress not draft the “unsolicited advertisement” definition to read: “any material advertising the ~~commercial~~ availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission” or simply “any material advertising ~~the commercial availability or quality~~ of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission”? Clearly, use by Congress of the adjective “commercial” has meaning and is intended to qualify and narrow the statutory definition of “unsolicited advertisement.”¹⁰

The statutory prohibition on “unsolicited advertisements” depends on the content of the unsolicited advertisement transmitted. According to the statutory definition, to be subject to the prohibition, an unsolicited facsimile advertisement must “contain material advertising the *commercial availability or quality* of any property, goods, or services. . . .” (emphasis added.) Congress plainly sought to provide for a narrow definition and to limit the application of the “unsolicited advertisement” prohibition by the use of the qualifying language – *commercial availability or quality*.

Review of the plain language of the statutory definition of – *commercial availability or quality* – leads to the conclusion that a prohibited unsolicited advertisement, by definition, must be motivated by a commercial purpose or interest. Therefore, according to the TCPA’s definition of “unsolicited advertisement,” if such advertised property, goods, or services were being offered via unsolicited facsimile transmission by an organization in pursuit of its tax exempt and nonprofit purposes, then such activity, by definition, should not be considered “commercial.”

Any analysis of whether an advertisement has the required commercial purpose, and would therefore be prohibited, must primarily examine the rationale for the activity, not simply whether the mechanics of the activity involve the purchase or sale of property, goods, or services or exchange of consideration. It is well established, indeed embedded, in both federal and state law that tax exempt nonprofit organizations are organized and operated to conduct their activities in ways fundamentally different from the ways in which taxable for-profit businesses conduct their activities. For example, each state’s statutory framework treats tax exempt nonprofit organizations differently, if not entirely separately, from the treatment of for-profit, taxable, equity-owned businesses. Likewise, the Internal Revenue Code treats tax exempt organizations differently from taxable entities and relies on an entirely separate and distinct section of the law to do so. Indeed, with one exception, the word *commercial* does not even appear in the federal statutory law regulating tax exempt organizations.¹¹

¹⁰ The Commission’s “Do-Not-Call” rules specifically address application to nonprofit organizations, but the unsolicited facsimile advertising rules do not reference nonprofit organizations, apparently because the different rules rely on different underlying statutory definitions – in the former, there is reliance on the broad “telephone solicitation” definition, and in the latter, there is reliance on the narrowly tailored “unsolicited advertisement” definition.

¹¹ Internal Revenue Code, Section 501(m).

Moreover, the Internal Revenue Code and corresponding regulations provide separate treatment to commercial-type business activities of tax exempt nonprofit organizations. When such an organization conducts business activities on a regular basis and those activities are not substantially related to the purposes for which the organization was granted tax exempt status (i.e., the unrelated business income tax or “UBIT” rules), the organization is subject to taxation on its net return and, if those activities are substantial, is at risk of losing tax exemption altogether. Application of the UBIT rules turn on whether the tax exempt nonprofit organization’s activity is consistent with, or substantially related to, its tax exempt nonprofit purposes. Thus, the Commission should be comfortable interpreting the unsolicited facsimile rule as not applicable to tax exempt nonprofit organizations when, and to the extent that, they are pursuing their tax exempt nonprofit purposes.

As noted, facsimile communications by tax exempt nonprofit organizations to their constituencies simply are not “advertising the commercial availability or quality of any property, goods, or services” and thus should not be covered by the Commission’s rule. Note, for example:

- A medical society’s notice to dues-paying physician members reminding them to register for the society’s annual meeting;
- A national health-related charity’s letter seeking participation and registration in a upcoming fund-raising event;
- A seniors’ organization flyer offering subscriptions to publications addressing independent senior living;
- A trade association’s release about a new book title on the latest business challenges to members;
- A university alumni organization’s promotional piece on the availability of a networking directory of alumni; or
- An advocacy organization’s request for contributions supporting the organization’s public policy causes.

Yet the Commission’s new interpretation of the statutory prohibition on unsolicited facsimile advertisements likely would equate the foregoing and many other similar activities with regulated commercial activities. Such a result is not intended under the statute.

These and similar facsimile communications made by tax exempt nonprofit organizations must not be affected by the purview of the new rule. They serve enormously valuable and largely essential societal purposes that have been recognized and authorized by federal and state governments through tax exempt and nonprofit status.

ASAE recognizes, however, that the TCPA prohibition on unsolicited facsimile advertisements may apply to a certain class of tax exempt nonprofit organization unsolicited facsimile transmissions. If a nonprofit organization were to direct a facsimile communication to constituents, either directly or through a for-profit taxable business

subsidiary, relating to an activity that is not substantially related to the organization's tax exempt nonprofit purposes under federal tax exemption nonprofit requirements, then the statutory prohibition on unsolicited facsimile advertisements would apply. This distinction can be easily stipulated, and readily enforced, if the Commission were to interpret the prohibition as not applicable to tax exempt nonprofit organizations when pursuing their tax exempt nonprofit purposes.

Constitutional Right of Association

In addition, the Commission's TCPA regulations would restrict communications by tax exempt nonprofit organizations to their members and other constituencies, raising grave constitutional questions under the fundamental right of association, which mandates a wholly different analysis than the pure commercial speech challenges that have been mounted to the TCPA thus far. The First Amendment's guarantee of a right to associate recognizes that individuals form groups to advance "political, economic, religious or cultural matters."¹² The NAACP case held that any "state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."¹³ The breadth of the guarantee is such that the Court has extended the constitutional protection both to any expressive activity of an organization, as well as to the organization's choice of a method for its dissemination.¹⁴

There is no safe harbor for the regulations merely because they would permit faxed communications to a tax exempt nonprofit organization's members after obtaining those members' and others' permission. The Court's precedents make clear that such a prior restraint cannot pass constitutional muster.¹⁵ Moreover, in *Elrod v. Burns*, 427 US 347, 373 (1976), the Court has held that the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." To require that every tax exempt nonprofit organization go back to its members for such permission is the type of delay that constitutes a constitutionally cognizable injury.

Given the significant First Amendment right at stake and the TCPA's own textual solicitude for tax exempt nonprofit organizations, the canon of "constitutional avoidance" advises against construing the TCPA to authorize the restriction contained in the Commission's regulations, at the very least with respect to communications between a tax-exempt nonprofit organization and its members and other constituencies. Under the canon, "when 'a statute is susceptible of two constructions, by one of which grave and

¹² NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460 (1958).

¹³ Id. at 460-61.

¹⁴ *Boy Scouts of America v. Dale*, 530 U.S. 640, 655 (2000).

¹⁵ See, e.g., *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002) (holding that ordinance that required individuals to obtain a routinely granted permit prior to engaging in door-to-door advocacy violated the First Amendment).

doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter."¹⁶

It must be understood that people join tax exempt nonprofit organizations for a variety of reasons that the regulations would adversely affect. Significant among them, people join tax exempt nonprofit organizations to advance a cause and participate in conferences and conventions to work on issues of social, economic or political importance. They also join tax exempt nonprofit organizations to assist in advancing and promoting the profile and public awareness of their profession and its good works. Members also desire to advance their individual professional standing by networking with others at association meetings, enrolling in continuing education programs, subscribing to publications or purchasing books that are available to members only. By joining such organizations, members expect to receive solicitations. When the solicitations are unwanted, they, as members, have more control to stop them than they would as one-time consumers of a product or service from a business, particularly in light of the fact that these organizations are governed by their members. First, they can ask the association to stop sending such faxes, a request that an association desiring to retain members would be obligated, and wise, to act upon. Second, they could resign from membership in the association, ending the relationship that permits such communications to fall outside the coverage of the TCPA. In such a situation, the tax exempt nonprofit organization would no longer be eligible for the constitutionally mandated exemption from the regulations that prohibit such unsolicited faxes.

Other Concerns

ASAE recognizes that the Commission is hopeful that Congress will explicate the private rights of action created under the TCPA. However, demands for payment have already begun to be received nationwide. It is only a short matter of time before those demands mature into lawsuits the verdicts for which will turn on what the Commission intended under its new rules. That process will inevitably involve the Commission in providing interpretations to help the Courts decide these issues. Accordingly, ASAE also requests the Commission to provide necessary clarification by giving concrete example of messages that are and are not advertisements, as well as by explaining whether "intent" is necessary for a violation and, if so, what "intent" means. By clarifying these and other issues in advance, the incidence of litigation will be reduced, and the need for the Commission's involvement in such litigation will be reduced.

CONCLUSION

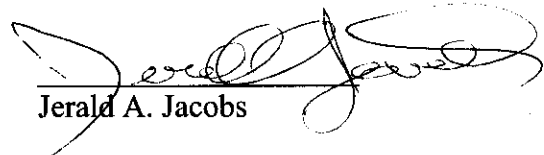
Based on the foregoing, ASAE respectfully requests that the Commission reconsider its Report and Order and adopt a Memorandum Opinion and Order consistent

¹⁶ Harris v. U.S., 536 U.S. 545, 555 (2002)(quoting United States ex rel. Attorney General v. Delaware & Hudson Co., 213 U.S. 366, 408 (1909)). See also Reno v. Flores, 07 U.S. 292, 314, n.9 (1993).

with the positions advanced in this Petition for Reconsideration and in the Petition for Emergency Clarification filed July 25, 2003, particularly that the Commission reconsider the applicability of the unsolicited facsimile advertisement rules to tax exempt nonprofit organizations, and as a consequence, to expressly hold that unsolicited facsimile communications of any type do not require the prior consent, express or otherwise, of the recipient where the communication is (i) from a tax exempt nonprofit organization and (ii) relates to one or more of the organization's duly authorized tax exempt nonprofit purposes.

Respectfully submitted,

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